SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1901.

THE KNIGHTS TEMPLARS AND MASONS' LIFE INDEMNITY COMPANY, *Petitioner*,

vs.

ROSA B. JARMAN, *Respondent.*

Certiorari to United States Circuit Court of Appeals, Eighth Circuit.

ARGUMENT FOR PETITIONER.

It is not intended in this brief to elaborate the arguments already submitted on behalf of the petitioner; but to make a few suggestions to reinforce the considerations urged when the petition was filed.

The following provision is found in the Revised Statutes of Missouri for 1879, as section 5982, afterward 5855; revised statutes of 1889:

"In all suits upon policies of insurance on life hereafter issued by any company doing business in this State, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the case that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

The policy in suit was written October 24, 1885, while this statute was in force. In 1887 the legislature of Missouri passed an act for the incorporation and regulation of assessment insurance companies, including in its provisions the regulation of companies incorporated in other States. Section 10 of that act, appears as section 5869 of the revised statutes of 1889, as follows:

"Statement of affairs to be made: Every corporation doing business under this article shall annually, on or before the first day of February, return to the superintendent of the insurance department, in such manner and form as he shall prescribe, a statement of its affairs for the year ending on the preceding 31st day of December, and the said superintendent, in person or by deputy, shall have the power of visitation of and examination into the affairs of any such corporation which (are) conferred upon him in the case of life insurance companies by the laws of this State; and all such foreign companies are hereby declared to be subject to and required to conform to the provisions of section 5912 of the Revised Statutes of Missouri, 1889; provided always that nothing herein contained shall subject any corporation doing business under this article to any other provisions or requirements of the general insurance laws of this State, except as distinctly herein set forth. (Laws, 1887, p. 199.)"

The petitioner in this case was an assessment insurance company organized under the laws of Illinois.

Section 5912 of the Revised Statutes of Missouri of 1889, originally adopted in 1885, referred only to the method of obtaining service on foreign insurance companies doing business in that State. The effect of the act of 1887, therefore, was to exempt assessment insurance companies from the operation of the so-called "Suicide Statute," on which the respondent relies in this case; and so the Supreme Court of Missouri holds in *Hayner* v. *Indemnity Co.*, 139 Mo. 410. In that case, however, the policy in suit was written after the adoption of the act of 1887.

The court below held that this act could not be construed to affect the rights of the parties to this case, because the suicide statute must be regarded as worked into the contract and as determining its meaning, scope and effect; and that it was not, therefore, within legislative competence to declare in 1887, in respect of policies theretofore written, that self-destruction might be pleaded as a defense, even where the policy so provided, because a legislative enactment to that effect would impair the obligation of the policy.

The court seemed to assume that if the legislature possessed this power the statute should be given the effect contended for by the petitioner; but the learned counsel for the respondent now insists that in the first place, the statute of 1879 was not repealed, and, second, that the position of the petitioner involves giving to the statute of 1887 a retroactive effect contrary to the constitution of Missouri.

It is true that this section of the statute was not repealed and it still remains in force as to insurance companies other than assessment companies. Assessment companies, however, and their policies were clearly exempted from the effect of this statute. As to such companies it was repealed. If the statute had been in express terms repealed, precisely the same argument would be made on behalf of the respondent that is now submitted. As that statute refers to suits upon policies of insurance on life hereafter issued, it would have been contended that its repeal simply relieved insurance companies from its inhibitions as to policies written after the repeal; and that to construe the repealing statute otherwise would be to give it a retrospective character.

I think it is plain that it is sufficiently accurate to say that

so far as this company or other similar companies are concerned that statute was repealed by the act of 1887. That is to say that they are relieved from its prohibitions and exempted from its operation and as to them it had no longer any existence. I think it is obvious also from the case in Tennessee, *Shields* v. *Clifton Hill Land Co.*, 94 Tenn. 123, cited in the brief filed with the petition, that a statute is not to be regarded as retrospective unless it is of such a character that it impairs the obligation of a contract or divests or impairs vested rights. Now in this case it can not be contended that the parties in entering into this contract of insurance contemplated that the insured would take his own life. For many years after the repeal of the suicide statute the insured continued to pay his premiums on this policy. He took his life on the 12th of September, 1898. From the time that the policy was written until the time of his death this provision exempting the company from liability in the event of self-destruction remained dormant. There was nothing for it to act upon until the contingency contemplated occurred; so there was nothing for the statute of 1879 to act upon until a suit was brought and the defense of self-destruction was interposed. Now when death occurred and when the suit was brought there was no statutory inhibition against the assertion of such a defense, if warranted by the language of the policy. I call particular attention to the language of this prohibitive statute:

"In all suits upon policies of insurance on life hereafter issued by any company doing business in this State, it shall be no defense that the insured committed suicide," etc.

This statute refers to suits brought after the statute went into effect. It can not operate upon suits brought before the

statute went into effect; nor, of course, upon policies written before the statute was adopted; nor, giving the repealing act strictly a prospective operation, can the statute repealed, have any application to suits brought after its repeal. The statute was, in substance, a legislative declaration that a certain defense in suits thereafter commenced should not be permitted in a certain class of cases. It is true that the section concludes with the statement that any stipulation in the policy to the contrary is void.

"All that can be meant by the term, according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land." (*Ewell* v. *Daggs.*)

That is the language of this court, as already quoted in the brief filed with the petition. There was nothing essentially immoral or contrary to public policy in the contract entered into between the insured and the insurance company. There is no reason whatever why the defense sought to be secured to the company in the contingency of self-destruction should not be interposed, except the positive prohibition of the statute. To say that when this statute was thus repealed as to insurance companies of this character, it no longer could operate to prevent such a defense, is not to give the repealing act a retrospective application or construction in any sense, but to apply it prospectively.

Now, I am well aware that many courts and judges have said, over and over again, that the law of a jurisdiction where a contract is made, in force at the time it is made, enters into and

becomes a part of it. I am not unmindful of the fact that Mr. Justice Swayne, speaking for this court in the case of *Walker* v. *Whitehead*, 16 Wall. 314, declared, *ex cathedra:*

"These propositions may be considered consequent axioms in our jurisprudence. The laws which exist at the time and place of the making of a contract and where it is to be performed enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement."

But with great deference, I venture to say that nothing can be more untenable than the statement that laws which affect the validity of a contract can in any just sense be said to be a part of or written into such a contract. Such statutes act externally and from without; they are no part of a contract. If they were they would be subject to modification by other parts of the same contract; to qualification, to limitation and to entire abrogation.

This court has recently had under consideration section 130 of the Criminal Code of Illinois. This is a penal statute directed against gambling in grain, stocks, etc., and concludes with the declaration that all contracts made in violation of that section shall be considered gambling contracts, and shall be void. It can not be said with any propriety, nor with any vestige of truth, that this statute is any part of a contract made in violation of its express terms. The statute absolutely destroys and nullifies such a contract. It is no more a part of it than a decree of a court of competent jurisdiction declaring a contract void for fraud, and annulling it, would be a part of that contract. Inaccurate expressions upon this subject have done very much to confuse the law. It is true in some instances the law is regarded as attaching terms, not ex-

pressed, to contracts. For instance, section 45 of chapter 98 of the statutes of Illinois, as it stood some years ago, provided that promissory notes should be entitled to days of grace. A note payable thirty days after date was, therefore, due, with grace added, thirty-three days after date. This was so because there being no expression to the contrary, the law presumed that the parties contracted with a view to this statutory provision and, by reasonable implication, a stipulation for days of grace was imported into the contract; but if the party making the note distinctly stipulated that it should be payable without grace, then there was no such implication; it was excluded by the express language of the contract and the law would then give effect to the stipulations of the parties. Nothing of the kind is possible with statutes affecting the validity of contracts; and if the learned counsel for the respondent will study attentively one of the cases which they cite, they will see that this court clearly recognizes this distinction. In the case of *Equitable, etc., Society* v. *Pettus, Administrator*, 140 U. S. 226, where the insurance company attempted by an express stipulation in the policy to evade a statute of Missouri, declaring an insurance policy after payment of two annual premiums to be non-forfeitable and subject to certain rules of commutation, this court held that this was inadmissible and said:

"The manifest object of this statute, as of many statutes regulating the form of policies of insurance on life or against fire, is to prevent insurance companies from inserting in their policies conditions of forfeiture or restrictions, except so far as the statute permits. The statute is not directory only or subject to be set aside by the company with the consent of the insured, but it is mandatory and controls the nature and terms of the contract into which the company may induce the assured to enter."

This language is in part quoted by counsel; and I should think it would be quite apparent that this was very far from saying that the statute became a part of the contract. The language of Mr. Justice Gray was that "it controls the nature and terms of the contract"; and again it is said:

"It follows that the insertion in a policy of a provision for a different rule of commutation from that prescribed by the statute in case of default in payment of premium after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not, is an ineffectual attempt to evade and nullify the clear words of the statute."

If a statute of this character is to be regarded only as a part of the policy, nothing is plainer than that by such explicit language as was employed in the case referred to its effect could have been entirely abrogated.

But a statute affecting and regulating the validity of contracts is not to be regarded in any such aspect whatever. It is no part of the contract, but entirely outside of it. It operates not by virtue of the agreement of the parties, but in spite of their engagements. It is a part of the municipal law, "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." It operates as law, and not by way of private convention. It respects not the purpose of the parties, but declares the will of the law making power. It can not be superseded, waived nor impaired by the agreement of the parties. It finds its authority not in their undertaking, but in those sanctions which attend upon all municipal law.

It follows, therefore, necessarily that the repeal of such a statute in no wise impairs the obligation of a contract against which it is aimed. It has nothing to do with the obligation of contracts. It confers no vested rights upon any one. It is legislation and not a grant of rights or privileges. As legislation it is subject to repeal and when repealed it is absolutely gone. It fixes and declares rights absolutely while it is law. When it ceases to be law its operation absolutely ceases and it is not like the provisions of a contract between individuals, still binding and enforceable. The legislature may undoubtedly repeal statutes; it can not repeal contracts—what parties have agreed to is not to be impaired by subsequent legislation. But nevertheless legislation which restricts the effect of contracts or refuses a remedy upon them may be repealed; and when repealed it ceases to be law.

I desire to make a further suggestion as to the effect of the statute of 1897, much relied upon by the Circuit Court, though not by the Circuit Court of Appeals, and commented upon by counsel for the respondent, page 28 of their brief. That statute is a part of the act of 1887, relating to assessment companies, but was amended so as to read as follows:

"Every corporation doing business under this article shall annually, on or before the first day of February, return to the superintendent of the insurance department in such manner and form as he shall prescribe, a statement of its affairs for the year ending on the preceding 31st day of December, and the said superintendent, in person or by deputy, shall have the power of visitation of and examination into the affairs of any such corporation, which (are) conferred upon him in the case of life insurance companies, by the laws of this State; and all such foreign companies are hereby declared to be subject to and

required to conform to the provisions of section *5855*, 5912, *5849* and *5850*, of the Revised Statutes of Missouri of 1889, and *governed and controlled by all the provisions in said sections contained;* provided always, that nothing herein contained shall subject any corporation doing business under this article to any other provisions or requirements of the general insurance laws of this State, except as distinctly herein set forth *and provided.*"

By including section 5855 in that statute, that section being the so-called "suicide statute" of Missouri, it is contended that the prohibitive statute in force when the policy was written is again revived and made applicable to it and must control the rights of the parties.

I have pointed out in the brief filed with the petition that this statute was not adopted in accordance with the constitution of Missouri, by reason of the fact that it was amended in its course through the senate, so that its title was not expressive of its purport and that it was so amended as to change its original purpose (original brief, page 35 *et seq.*). But, incident to this question, if the petitioner is right in the contention that by the repeal of the act of 1879 the contract between the assured and the insurance company including the provision as to relieving the company from liability in case the assured took his own life, became effective, it is quite apparent that the legislature could not thereafter by re-enacting this suicide clause or attempting to subject assessment insurance companies to its provisions, impair the effect of a contract subsisting between the assured and this petitioner. The petitioner is insisting upon its contract with the assured.

Whether this particular clause in the policy became effective at the time the contract was entered into or, being dormant dur-

ing the time that the so-called suicide statute was in effect, became, when relieved from the prohibition of that statute, a valid engagement, the petitioner has a right to insist that it shall be protected, under the clause of the federal constitution which forbids a State passing any law impairing the obligations of contracts.

This view has not, I believe, been suggested in the briefs heretofore filed on behalf of the petitioner. I do not desire to elaborate upon it, but it is, I think, conclusive as to the effect of the law of 1897.

Respectfully submitted,

S. S. GREGORY,

Counsel for Petitioner.